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JAMES H. McKENNEY,
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OLEOMARGARINE TAX CASES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

AUGUST CLIFF,
Plaintiff in error,
vs.
THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

No. 614, October Term, 1902.
No. 221, October Term, 1903.

FREDERICK J. SCHICK,
Plaintiff in error,
vs.
THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

No. 615, October Term, 1902.
No. 222, October Term, 1903.

WILLIAM BROADWELL,
Plaintiff in error,
vs.
THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

No. 616, October Term, 1902.
No. 223, October Term, 1903.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR ON QUESTION OF JURISDICTION.

WILLIAM D. GUTHRIE,
FRANCIS J. KEARFUL,
Of counsel.

Washington, October Term, 1903.

[18,842, 18,843, 18,844.]

Plaintiff in error,

vs.

THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

FREDERICK J. SCHICK,
Plaintiff in error,

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WILLIAM BROADWELL,
Plaintiff in error,

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THE UNITED STATES.

In error to the District Court of the United States for the Northern District of Illinois.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS
QUESTION OF JURISDICTION

I.

In the cases at bar, the proceeding
instituted by information to recover t
fifty dollars prescribed in section 11
August 2, 1886, c. 840, 24 Stat. 209, a
the act of May 9, 1902, c. 784, 32 Stat.
tion reads as follows:

> "Sec. 11. That every person
> purchases or receives for sale any

[18,842, 18,843, 18,844.]

OLEOMARGARINE TAX CASES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 614, October Term, 1902.
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dings below were
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9, as amended by
at. 193, which sec-

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which has not been
to law shall be liab
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The act in other secti
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The Judiciary Act of

Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: . . .

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States . . . is drawn in question."

There can be no doubt that the proceedings below were cases within the meaning of the above provision, *i. e.*, the construction or application of the Constitution of the United States was involved and the constitutionality of a law of the United States was drawn in question. Criminal cases are included in the judiciary act of 1891 (*Motes* v. *United States*, 178 U. S. 458, 466), and an information to recover a penalty is clearly in the nature of a criminal proceeding, although the liberty of the defendant is not at stake. *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216; *Lees* v. *United States*, 150 U. S. 476, 479.

Appellate jurisdiction to review the judgments below and to correct any errors of law appearing on the record would, therefore, seem to exist.

been branded or stamped according
e liable to a penalty of fifty dollars
ffense."

sections plainly recognizes the dis-
e, forfeiture and penalty.

II.

Article III of the Constitut
provides as follows:

"The trial of all crime

enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The Seventh Amendment provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Section 566 of the Revised Statutes provides as follows:

> "The trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury." (Act of September 24, 1789, c. 20, sec. 9, 1 Stat. 77; Act of February 26, 1845, c. 20, 5 Stat. 726.)

Each defendant, in the cases at bar, was charged by information (*Cliff*[1] record, p. 3) with having violated section 11 above quoted, and each defendant moved

[1] As all the records are practically the same, it will be sufficient to refer to the *Cliff* record.

made upon the same grounds contained in the motion to find defendant not guilty, which motion was overruled, and to which ruling exception was duly taken (pp. 4, 23–24). Thereupon, the court rendered judgment upon the finding of guilty that the defendant forfeit and pay to the United States a fine in the sum of fifty dollars as provided by the law in question, together with the costs of the prosecution (record, pp. 4, 24). It is this judgment, rendered against the contention of the defendant that the law authorizing it was unconstitutional, that this court is now called upon to review.

The case of *Rogers* v. *United States*, 141 U. S. 548, was an action at law for the recovery of certain moneys due the United States on a bond, and the parties filed a written stipulation waiving the right of trial by jury and consenting that the cause be tried by the court without a jury, as in the cases at bar (record, p. 5). In the course of the opinion of the court, Mr. Justice Blatchford, among other things, said (p. 554):

> "There was no statute in existence which provided for the trial in the District Court by the court without a jury. It is provided by § 566 of the Revised Statutes that 'the trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury.'

ot guilty (record, pp. 6, 22) be-
ited States was unconstitutional,
nerefor all of the grounds em-
nt of errors. This motion was

otherwise triable by a jury, the parties may, by stipulation, waive a jury and agree on a statement of facts, and submit the case to the court thereon, for its decision as to the law. *Henderson's Distilled Spirits*, 14 Wall. 44, 53. That might have been done also in the Circuit Court, without any statute to that effect. *Campbell* v. *Boyreau*, 21 How. 223, 226, 227. This, however, is not the finding of issues of fact by the court upon the evidence. The provisions of §§ 649 and 700 relate wholly to such finding, and not at all to the action of the court upon an agreed statement of facts.

In the present case, the Circuit Court could not properly consider any of the matters raised by the bill of exceptions; nor can this court do so. All that the Circuit Court could do was to affirm the judgment of the District Court; and all that this court can do is to affirm the judgment of the Circuit Court. The Circuit Court had jurisdiction by its writ of error, and this court has jurisdiction in the present case."

The case of *Henderson's Distilled Spirits*, 14 Wall. 44, 53, was the case of an information to enforce a forfeiture, and it was held that the defendant could waive a jury and agree to the trial before the judge upon an agreed statement of facts, irrespective of any legislative provision upon the subject.

In the cases at bar, however, there was no agreed statement of facts but only a waiver and agreement that

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The provision for waiving a jury in § 649 of the Revised Statutes, applies only to the Circuit Court, as does also a special provision of § 700, in regard to the review by this court of a case tried in the Circuit Court by the court without a jury. There are no similar provisions in regard to trials

the information should be tried
jury. The question is, therefor
quiry whether the rule announ
applies to proceedings by way of

114 U. S. 417, 424.

The foundation of the rule in civil cases cannot be better stated than in the following language of Chief Justice Taney in *Campbell* v. *Boyreau*, 21 How. 223, 226, quoted in *Rogers* v. *United States*, 141 U. S. 548, 555:

> "The finding of issues of fact by the court upon the evidence is altogether unknown to a common law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impanelled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court cannot regard the facts found by the judge as having been judicially determined

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erefore, narrowed to the in-
nounced in the *Rogers* case
ay of information to recover

Thus, it appears that the reason of this rule in civil cases is founded on the fact that no code of procedure had been provided by Congress, that it was intended that such procedure should follow the course of the common law, and that the practice at common law was to try all issues of fact in civil cases by jury. Hence it is said that "the finding of issues of fact by the court upon the evidence is altogether unknown to a common law court."

But this reasoning does not apply to a criminal case to recover a penalty, which is permitted to be instituted by information, because no jury trial in such criminal cases was known to the common law. Although the cases at bar might have been instituted by indictment, nevertheless they were also plainly such as to be properly instituted by information. *Lees* v. *United States*, 150 U. S. 476, 479; *Ex parte Wilson*, 114 U. S. 417, 423–425; *United States* v. *Block*, 4 Sawy. 211, 215; *United States* v. *Maxwell*, 3 Dill. 275, 279; *United States* v. *Shepard*, 1 Abb. U. S. 431, 438.

In the case of *In re Bonner, Petitioner*, 151 U. S. 242, 258, in speaking of the necessity of a trial by jury of an indictment or information, the court clearly has reference to that class of serious offenses involving, or

in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as

which may involve the libe
in *Callan* v. *Wilson*, 127 U
in *Thompson* v. *Utah*, 170 U

petty offenses and actions to recover small amounts without impairing the constitutional right of trial by jury. Mr. Justice Gray said (pp. 16–17):

> "By the common law, justices of the peace had some criminal jurisdiction, but no jurisdiction whatever of suits between man and man. There were in England, however, courts baron, county courts, courts of conscience and other petty courts, which were not courts of record, and whose proceedings varied in many respects from the course of the common law, but which were empowered to hear and determine, in a summary way, without a jury, personal actions in which the debt or damages demanded did not exceed forty shillings. 3 Bl. Com. 33, 35, 81. The twelve freeholders summoned to the county court of Middlesex, and authorized, when there assembled together with the county clerk, and without any judge being present, to decide by a majority, and in a summary way, causes not exceeding forty shillings, under the statute of 23 Geo. II, c. 33, (1750) commended by Blackstone, were clearly not a common law jury. 3 Bl. Com. 83, and Coleridge's note.
>
> In this country, before the Declaration of Independence, the jurisdiction over small debts, which county courts and similar courts had in England, was generally vested in single justices of the peace."

And again, referring to the holding in *Callan* v. *Wilson*, 127 U. S. 540, that a person accused of a

liberty of the citizen, as defined
27 U. S. 540, 549, 552–555, and
170 U. S. 343, 353. Mr. Justice
In *Maxwell v. Louisiana*, [illegible]
a conviction without a jury under a municipal ordinance imposing a fine of twenty-five dollars, the court, by Mr. Justice Gray, said:

> "A breach of such an ordinance is one of those petty offenses against municipal regulations of police, which in Louisiana, as elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury. Louisiana Constitution of 1852, arts. 103, 124; Constitution of 1868, arts. 6, 94; *State* v. *Gutierrez*, 15 La. Ann. 190; *Mayor, &c., of Monroe* v. *Meuer*, 35 La. Ann. 1192; *Callan* v. *Wilson*, 127 U. S. 540, 553, 555."

In 4 Blackstone's Commentaries, 280, "summary proceedings" are defined as being those in which "there is no intervention of a jury" and they are described as—

> "an institution designed professedly for the greater ease of the subject by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offense."

Particularizing further, the learned commentator says (p. 281):

> "Of this summary nature are all trials of offenses and frauds contrary to the laws of the excise and other branches of the revenue. . . .
>
> Another branch of summary proceedings is that before justices of the peace, in order to inflict divers petty pecuniary mulcts and corporal penal-

criminal conspiracy could not
by a jury, Mr. Justice Gray sa
"The decision proceed

ties denounced by act of parliament for many disorderly offenses, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others."

In Stephen's History of the Criminal Law of England, vol. 1, p. 123, the author says:

"Speaking very generally, it may, I think, be said that the general character of statutes giving summary jurisdiction to magistrates was for a great length of time to enable them to deal with matters of small importance, more particularly with offenses in the nature of trifling nuisances or disturbances of good order, jurisdiction in cases of serious crime being reserved for juries. Besides this, it was the common characteristic of these acts to leave the subject of procedure unprovided for, or provided for only in a very general and insufficient manner."

In *Williams* v. *Augusta*, 4 Ga. 509, 561, it was held that a pecuniary penalty imposed for violation of a municipal ordinance could be recovered without a jury consistently with the usual constitutional right of trial by jury.

In *Byers and Davis* v. *Commonwealth*, 42 Pa. St. 89, 94, the court, by Strong, J. (afterwards Mr. Justice Strong), said:

"Our business at present is to ascertain how far the right to a trial by jury extended—to what controversies it was applicable. It was a right the title to which is founded upon usage, and its measure is therefore to be sought in the usages which prevailed at the time when it was asserted. But never in England was there any usage, and consequently never was there any right in the subject, that every litigated question of fact should be submitted to a jury. In all that large class of cases which are cognizable in courts of equity, there never was any right of

> trial by jury; nor did the right extend to many other civil and criminal proceedings. Summary convictions for petty offenses against statutes were always sustained, and they were never supposed to be in conflict with the common law right to a trial by jury."

In *People* v. *Fisher*, 20 Barb. 652, 658, as a reason for holding that petty offenses not infamous could be prosecuted by information and tried without a jury, the court, by Welles, J., said:

> "No jury trial in criminal cases was ever known to the common law, but such as followed upon indictment in a common law court, after the accused was in custody, had been arraigned and had pleaded to the indictment."

Quoting this language with approval, the Supreme Court of Illinois, by Magruder, J., in *Brewster* v. *People*, 183 Ill. 143, 150, said:

> "As jury trials in criminal cases, as known to the common law, were such as followed upon indictment in a common law court, and as our constitution refers to the right of trial by jury as it was understood at common law, then the prohibition against the right to waive a trial by jury cannot apply to misdemeanors, because the constitution expressly provides that, in cases of misdemeanors, a person may be held to answer without indictment."

Conclusion.

It is, therefore, submitted that, in a prosecution by way of information to recover a penalty for violation of a revenue law, a jury trial is not required in the district courts by reason of any constitutional or statutory provision, and that, as such trials were had at common law before a judge without a jury, there is no reason why a defendant may not waive a jury trial or why the pro-

ceedings thereupon are not subject to review for errors of law the same as any other case within the jurisdiction of the district courts involving the constitutionality of an act of Congress.

Washington, December 12, 1903.

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